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No. 88-1430 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNION ASPHALTS and ROADOILS, INC., et al.,
Petitioners,
vs.
MO-KAN TEAMSTERS PENSION FUND, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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No. 88-1430

In the Supreme Court of the United States

OCTOBER TERM, 1988

Union Asphalts and Roadoils, Inc.; Patricia M. Lorenz; David M. Lorenz; David Dill,

Petitioners,

vs.

Mo-Kan Teamsters Pension Fund; Karl Rogers, Trustee; Richard Milone, Trustee; Robert Gillihan, Trustee; Gayle D. Starling, Trustee; James Duvall, Trustee; Richard Knipp, Trustee; Frank J. Mobley, Trustee; William W. Weeks, Trustee; American Benefit Plan Administrators, Inc.,

Respondents.

Mo-Kan Teamsters Pension Fund; Karl Rogers; Richard Milone; Robert Gillihan; Gayle D. Starling; Michael Rogers; James Duvall; Richard Knipp; Leo Zahner, III; and William W. Weeks, Trustees of the Mo-Kan Teamsters Pension Fund,

Respondents,

vs.

Union Asphalts and Roadoils, Inc.; Patricia M. Lorenz; David M. Lorenz; David Dill,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

STATUTORY PROVISIONS INVOLVED

Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. Sec. 1381, et seq.

29 U.S.C. §1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

29 U.S.C. §1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of

the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be

conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

Taft-Hartley Act

29 U.S.C. §158(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce" and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any

other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. §158(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this sub-

section shall set aside the final proviso to subsection (a) (3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (Petitioners' Appendix at A38) and the Court of Appeals. (Petitioners' Appendix at A53.)

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among the Circuits. Pursuant to 29 U.S.C. §1401(b)(2), the District Courts Have the Authority to Review an Arbitrator's Award, Including the Conclusions of Law and Enforce, Vacate or Modify the Award.

Union Asphalts and Roadoils, Inc. (UA) argues that a conflict exists between the Eighth Circuit in *Union Asphalts and Roadoils, Inc., et al. v. Mo-Kan Teamsters Pension Fund, et al.* (*Union Asphalts*), and the District of Columbia and Third Circuits' decisions in *Washington Star Company v. International Typographical Union Negotiated Pension Plan,* 729 F.2d 1502 (D.C. Cir. 1984) (*Washington Star*), and *United Retail and Wholesale Employees Teamsters Local Union No. 115 Pension Plan v. Yahn & McDonnell,* 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided court,* 107 S.Ct. 2171 (1987) (*United Retail*). UA contends that such alleged conflict

mandates that this Court consider this matter in order to assure uniformity in review of arbitrator's decisions under MPPAA.

There is no conflict between the decision in *Union Asphalts* and the *Washington Star* and *United Retail* cases. As the Eighth Circuit stated in its opinion (Petitioners' Appendix at A59), the appellate courts in *United Retail* and *Washington Star* dealt with constitutional issues; neither decision designated a standard for review of an arbitrator's legal determinations in withdrawal liability cases under MPPAA. The Eighth Circuit stated: "Thus, although UA looks to *United Retail* and *Washington Star* for support, the courts in those cases did not decide the current issue". The issue here is, of course, the standards of judicial review of an arbitrator's construction of 29 U.S.C. §1383, which refers to "building and construction industry". (Petitioners' Appendix at A59.)

UA contends that *United Retail* and *Washington Star* hold that an arbitrator's conclusions of law are not subject to *de novo* review. However, a careful reading of both decisions reveals that neither involves or decides such an issue.

United Retail and *Washington Star* involved constitutional challenges to MPPAA. The court in *Washington Star* passingly referred to the MPPAA arbitration provisions in its background discussion of MPPAA. However, there was no specific issue raised or decided concerning judicial review of an arbitrator's statutory interpretation. The only reference to the issue in *United Retail* is in footnote 9 at 135, which refers to 29 U.S.C. §1401(c)'s requirement of deference to the arbitrator's findings of fact. However, there is no discussion in

United Retail concerning the provisions of 29 U.S.C. §1401(b)(2), which allows for the bringing of an action "to enforce, vacate or modify the arbitrator's award." Nor is there a reference in *United Retail* footnote 9 to 29 U.S.C. §1401(b)(3), which provides that the proceedings shall be enforced in United States courts as an arbitration proceeding carried out under Title 9, but only "to the extent consistent with this subchapter." Therefore, neither *United Retail* nor *Washington Star* may be said to decide the issue of a court's review of an arbitrator's interpretation of a statutory provision of MPPAA.

UA argues that five circuit courts of appeal have rejected constitutional challenges to MPPAA's arbitration provisions without relying on *de novo* review of the arbitrator's decision. UA's reliance on the five cited cases is simply not justified. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund,* 762 F.2d 1137 (1st Cir. 1985) (*en banc*) (*Fulton*), hinges on the role of the trustees in determining the amount of withdrawal liability, the presumption of reasonableness of the determination and whether the statutory presumption in favor of the trustees' determination is constitutional. There is no mention in the opinion of the standard of judicial review of an arbitrator's decision. The only reference in *Fulton* to dispute resolutions is at 1139 and 1143, wherein the court states in a passing comment that if an injustice occurs the procedure provides for relief in arbitration or in federal court.

UA relies on *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985) (*Western Teamsters*).

Western Teamsters also involves constitutional challenges to MPPAA. The Ninth Circuit stated that in enacting MPPAA Congress delegated to arbitrators the power to make "limited factual findings in an area within which they possessed special expertise. Only these factual findings are presumed correct, 29 U.S.C. §1401(c), and therefore, the district court may review all conclusions of law." (l.c. 1403.) *Western Teamsters,* contrary to UA's argument, sustains the Eighth Circuit's determination that the federal courts have the authority to review conclusions of law made by an arbitrator in a withdrawal liability case. *Western Teamsters* was cited to that effect in the opinion of the Eighth Circuit in Petitioners' Appendix at A58.

UA relies on *Terson Company v. Bakery Drivers and Salesmen Local 194,* 739 F.2d 118 (3rd Cir. 1984) (*Terson*). *Terson* also involves a constitutional challenge to MPPAA. The court at 120 states only that MPPAA provides for judicial review in the event arbitration fails to resolve the controversy. However, there is no mention in *Terson* of the court's authority to review the arbitrator's decision in statutory interpretation cases.

UA cites *Textile Workers Pension Fund v. Standard Dye & Finishing Company,* 725 F.2d 843 (2nd Cir. 1984), *cert. denied,* 467 U.S. 1259 (1984) (*Textile Workers*). *Textile Workers* also involves constitutional challenges to MPPAA. The court there commented on page 854 that Congress in enacting MPPAA, and specifically the provisions for arbitration, properly vested the fact finding in a specialized tribunal rather than a jury. The opinion, by mentioning only the fact finding authority of the arbitrator, seems to say, if only by implication, that the

arbitrator is limited to finding the facts. There is certainly nothing in *Textile Workers* to indicate that the authority to determine legal or statutory issues was taken from the courts by MPPAA.

UA does not contest that legal conclusions of an arbitrator are subject to review under the Federal Arbitration Act, but contends there is a distinction between allowing a court to review the arbitrator's legal conclusions and a *de novo* review. (Petition at 19.) However, it is apparent that neither the district court nor the Eighth Circuit engaged in a *de novo* review of the arbitrator's decision to the extent that the courts disagreed with the facts found by the arbitrator. The district court concluded upon a careful review that "none of the arbitrator's challenged findings of fact are demonstrably incorrect by the clear preponderance of the evidence." (Petitioners' Appendix at A40.) The Eighth Circuit confirmed that the district court had accepted the arbitrator's factual findings. (Petitioners' Appendix at A58.) Both the district court's opinion and the opinion of the Court of Appeals relate solely to the interpretation or construction of the pertinent statute, to wit: 29 U.S.C. §1383(b), MPPAA's construction industry proviso. Therefore, the review by the courts did not constitute a *de novo* review, but was clearly a review of the arbitrator's conclusions of law and interpretation of §1383. As will be noted below, the courts of appeal which have decided the issue appear to be unanimous in their opinions that an arbitrator's decision in a withdrawal liability case is, indeed, subject to *de novo* review by the courts with the exception of the presumption of the correctness of the finding of fact as provided in 29 U.S.C. §1401(c). Certainly, the courts of appeal considering the issue are unanimous that judicial review of legal conclusions and statutory interpretations

of an arbitrator is appropriate under the MPPAA dispute resolution provisions.

The Eighth Circuit cited with approval the decision in *Republic Industry, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628 (4th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984) (*Republic*). *Republic* involves several constitutional challenges to MPPAA, one of which was that the dispute resolution provisions of the Act are constitutionally defective because they convert judicial review into *pro forma* review rather than a *de novo* determination. (l.c. 640.) In rejecting Republic's argument, the Fourth Circuit observed that §1401(b)(3) of the Act provides that arbitration proceedings shall be conducted subject to 9 U.S.C. §1, *et seq.*, and that 9 U.S.C. §10 prohibits judicial review of legal or factual disputes voluntarily submitted to an arbitrator. However, the court went on to say that §1401(b)(2) clearly authorizes judicial review "to enforce, vacate or modify the arbitrator's award and gives a right to review an arbitrator's legal rulings. Since 9 U.S.C. §10 is not consistent with §1401(b)(2), the latter prevails."

UA's argument that the Arbitration Act's judicial review provisions prevail over MPPAA's judicial review provisions would nullify §1401(b)(2), which clearly was not the intention as evidenced by §1401(b)(3), which provides that the arbitration proceedings must be consistent with the Act (MPPAA).

UA's contention that the decision in *Republic* is dicta is contrary to the statements in the opinion setting forth the issues in respect to denial of procedural due process and the specific ruling in regard to that specific issue. (l.c. 640.)

The Eighth Circuit also cited with approval *Trustees of the Amalgamated Insurance Fund v. Geltman Industries, Inc.*, 784 F.2d 926 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 90 (1986) (*Geltman*). The Court of Appeals in *Geltman* was asked to review an arbitration ruling concerning interpretation of pertinent sections of 29 U.S.C. §1405 (MPPAA). The court held that the clear authorization of 29 U.S.C. §1401(b)(2) gives the court a right to review an arbitrator's legal rulings and that statutory interpretation is a question of law subject to *de novo* review. *Citing, Republic Industry, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, supra; Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., supra;* and *United States v. Horowitz*, 756 F.2d 1400, 1403 (9th Cir.), *cert. denied*, 106 S.Ct. 74 (1985). As in *Geltman*, the instant case involves interpretation of a section of MPPAA, to wit: 29 U.S.C. §1383.

In *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204 (D.C. Cir. 1984), cited by the Eighth Circuit in its opinion (Petitioners' Appendix at A58), the D.C. Court stated in footnote 7 at 1207:

> . . . Under MPPAA, however, the decisions of the arbitrator, like the decisions of a typical administrative agency, are fully reviewable to determine whether applicable statutory law has correctly been applied and whether the findings comport with the evidence. See 29 U.S.C. 1401(a)(3)(A). . . .

In *T.I.M.E.-D.C., Inc. v. Management Labor Welfare and Pension Funds of Local 1730 and International Longshoremen's Association*, 756 F.2d 939 (2nd Cir. 1985), the court considered whether compliance with the transfer

provisions of 29 U.S.C. §1415 is a condition precedent to the assessment of withdrawal liability. The Second Circuit held that the issue was one of statutory interpretation and, as such, is outside the scope of those issues that Congress direct to an arbitrator in MPPAA. The court stated that MPPAA subjects to arbitration factual issues, the resolution of which is necessary to calculate withdrawal liability such as the number of employees covered or the dollar amount of vested benefits; however, resolution of the applicability of 29 U.S.C. §1415 does not call into play the expertise of an arbitrator who would have no superior expertise in such matters. (l.c. 945.)

A MPPAA matter need not be submitted to arbitration initially where the issue involves a constitutional question and, in some circumstances, statutory interpretation. *New York Teamsters Pension Fund v. McNicholas Transportation Co.*, 848 F.2d 20; 9 EBC 2089 (2nd Cir. 1988); *Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters Fund*, 847 F.2d 113; 9 EBC 2345 (3rd Cir. 1988). In *Union Asphalts*, arbitration was initially used to determine facts with the courts called upon only after arbitration to make a final determination of the meaning of the statute at issue.

Contrary to the contentions of UA, there is no conflict between the courts of appeal on the issue of judicial review of an arbitrator's legal conclusions and statutory interpretations. On the contrary, the cases relied upon by the Eighth Circuit in its opinion herein, and other cases cited above, clearly indicate that the courts of appeal considering the issue are unanimous in their opinions that an arbitrator's interpretation of the law is subject to *de novo* review by the courts. The two

cases relied on by UA, to wit: *United Retail* and *Washington Star,* simply do not decide the issue or at best contain dicta relating primarily to constitutional challenges of MPPAA in its entirety, and specifically of procedural due process in the provisions of MPPAA allowing the trustees to make withdrawal liability determinations.

Assuming, arguendo, that an arbitrator's decision is basically conclusive as to issues of fact and that an arbitrator's legal decisions and statutory interpretations are final and not reviewable by the the federal courts, one may ask what role the federal courts have in the resolution of MPPAA withdrawal liability cases under 29 U.S.C. §1401(b)(2), which grants the district courts authority to "enforce, vacate, or modify the arbitrator's award." Such a position would make it virtually impossible for a court to take action to vacate or modify the award and leave the court in a position to do only one - enforce the award.

Pursuant to 29 U.S.C. §1401(b)(2), authority to review an arbitrator's decision is clear. Interpretation of a federal statute is a matter reserved for federal courts. Citations for that elementary principle would not appear necessary; however, see *Northwest Air Lines, Inc. v. Air Lines Association,* 442 F.2d 251, 255 (8th Cir. 1971).

II.

The Decision of the Eighth Circuit Does Not Involve an Important Question of Federal Law Which Should Be Settled by This Court.

UA's argument concerning the Eighth Circuit's interpretation of "in the building and construction indus-

try" is an argument on the merits. Such an argument is not appropriate under Rule 17, Rules of the Supreme Court.

The issue decided by the Eighth Circuit in *Union Asphalts* was the interpretation of 29 U.S.C. §1383(a) and (b), and more specifically 29 U.S.C. §1383(b)(1)(A). Although MPPAA has been in effect since September 26, 1980, Respondents have found no decisions by a federal court or an arbitrator which defines "in the building and construction industry"; this despite the fact there are dozens, if not hundreds, of court and arbitration decisions involving interpretations of MPPAA. There are no federal courts of appeal decisions in conflict with *Union Asphalts*. In view of the passage of some eight and one-half (8½) years since the enactment of MPPAA without a federal court decision or an arbitration decision, interpretation of that clause would not appear to be such an important question of federal law that should be settled by this Court as required by Rule 17.

UA's Petition for Writ of Certiorari cites no cases in conflict with the Eighth Circuit decision in *Union Asphalts*. The Eighth Circuit and the district court accepted and recognized the arbitrator's finding and conclusions of fact, but after a careful review of the applicable law concluded that UA employees did not perform work in the building and construction industry as required by 29 U.S.C. §1383(b)(1)(A). Such a conclusion is not in conflict with applicable decisions of this Court or in conflict with other federal courts of appeal.

III.

The Eighth Circuit Correctly Interpreted the "Building and Construction Industry" Provision of 29 U.S.C. §1383(b)(1)(A) by Reference to Interpretations of 29 U.S.C. §158(f) of the Taft-Hartley Act. Interpretations of 29 U.S.C. §158(e) of Taft-Hartley Also Are Applicable.

The Eighth Circuit correctly decided in this case that UA's employees did not perform work "in the building and construction industry". The decision states that UA was merely a supplier. UA's employee-truck drivers drove tank trucks to construction sites and off-site asphalt plants and discharged the petroleum product into holding tanks or occasionally to a spreader on the job site. (Eighth Circuit's Opinion: Petitioners' Appendix at A62; District Court's Opinion: Petitioners' Appendix at A41-42.) Those findings of fact, as the District Court stated in its opinion, are part of the arbitrator's findings. (Petitioners' Appendix at A40.)

As stated by the Eighth Circuit, the term "building and construction industry" is not defined in MPPAA; however, the legislative history indicates that the term should be given the same meaning as developed in the administration of the Taft-Hartley Act. The Eighth Circuit and the district court looked to 29 U.S.C. §158(f) (Section 8(f) of the Taft-Hartley Act) because it contains the identical term as 29 U.S.C. §1383(b)(1)(A).

Applying the interpretation to Section 8(f) by the National Labor Relations Board and the courts, the district court and court of appeals determined that UA's employees were not performing work "in the building and construction industry" as required by Section 8(f), although UA may have been tangentially connected to or

affected by that industry. *Carpet, Linoleum, and Soft Tile Local Union No. 1247,* 156 NLRB 951, 959 (1966) (*Indio Paint*); *NLRB v. W.L. Rives Co.,* 328 F.2d 464, 469 (5th Cir. 1964); *Forest City/Dillon-Tecon Pac.,* 209 NLRB 867, 868, 870-871 (1974), *enforced in part,* 522 F.2d 1107 (9th Cir. 1975); and *Construction, Bldg. Materials & Miscellaneous Drivers, Local No. 83,* 243 NLRB 328, 331 (1979). Therefore, under the facts as determined by the arbitrator, both the district court and court of appeals determined that the construction proviso of MPPAA (29 U.S.C. §1383 (b)(1)(A)) did not apply to UA, a supplier. The decision in *Union Asphalts,* therefore, was correct on the facts as found by the arbitrator.

Respondents also contended below that consideration should be given to interpretation of 29 U.S.C. §158(e) (Section 8(e)), as well as interpretation of 29 U.S.C. §158 (f) (Section 8(f)). Section 8(e) refers to "construction industry". However, the district court rejected such argument because the Section 8(e) reference to "construction industry" is not identical to the term "building and construction industry" used in 29 U.S.C. §1383(b)(1)(A). Cases construing Section 8(e) hold that material suppliers are not in the construction industry because to be in the construction industry the employer's activities must take place at the construction site and involve construction work. UA's employees, of course, did not perform work at the construction site. *Drivers Local 695 v. NLRB (Madison Employers Council),* 361 F.2d 547 (D.C. Cir. 1966); *NLRB v. International Brotherhood of Teamsters Local 294,* 342 F.2d 18 (2nd Cir. 1965); *Joint Council of Teamsters No. 42 and Associated General Contractors (California Dump Truck Owners),* 248 NLRB 808 (1980); *Joint Council of Teamsters No. 42 (Inland Concrete),* 225 NLRB 209, 93 LRRM 1383 (1976); *Teamsters, Local Union*

No. 631 (Reynolds Electrical), 154 NLRB 67 (1965); *International Brotherhood of Teamsters, Local 294 (Island Dock)*, 145 NLRB 484 (1963), *enforced*, 342 F.2d 18 (2nd Cir. 1965); *Teamsters Local Union No. 559 (Connecticut Sand & Stone Corp.)*, 138 NLRB 532, 51 LRRM 1092 (1962); *Landstom v. Teamsters Local 65*, 82 LRRM 3141 (2nd Cir. 1973); and *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975).

Therefore, on the basis of Section 8(e), as well as Section 8(f), UA's employees did not perform work "in the building and construction industry", and UA is subject to withdrawal liability under the Act.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully Submitted,

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